

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1545

COMMONWEALTH

vs.

KYRON SIMMONS.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Based on evidence that the defendant had a loaded firearm in his pants pocket, a Superior Court jury convicted the defendant of unlawful possession of a firearm and unlawful possession of a loaded firearm.¹ On appeal, the defendant challenges only the latter conviction. The Commonwealth properly concedes that this conviction must be vacated, because the jury were not instructed that they had to find that the defendant knew that the firearm was loaded. See Commonwealth v. Brown, 479 Mass. 600, 608 (2018); Commonwealth v. Mitchell, 95

¹ The defendant subsequently pleaded guilty to the subsequent offense portion of the indictment charging him with unlawful possession of a firearm. In addition, so much of that indictment charging him as an armed career criminal for having committed three prior violent crimes was dismissed prior to trial. The jury acquitted the defendant of armed robbery and assault and battery.

Mass. App. Ct. 406, 411-412 (2019).² The sole remaining issue before us is whether the defendant is entitled to a judgment of acquittal on the ground that the Commonwealth's trial evidence was insufficient to prove such knowledge. We agree with the Commonwealth that the defendant is not so entitled.

We begin by noting that the facts presented here are markedly different from those at issue in Brown. The firearm in Brown was discovered in the console between the rear passenger seats of a car that the defendant was driving. Brown, 479 Mass. at 602. The defendant there told the police that his former girlfriend's sister had been waving the gun around during an argument she was having with an unknown man, that he (the defendant) had disarmed the sister, and that he, upon returning to the car, had handed the gun to a rear seat passenger (intending to dispose of it later). Id. at 603. It was in that context that the court found that there was insufficient evidence that the defendant knew that the gun was loaded. Id. at 608-609.

² As we said in Mitchell, "[e]rroneous instructions that allow the jury to convict without finding an essential element of an offense create a substantial risk of a miscarriage of justice unless either the element at issue can be ineluctably inferred from the evidence such that the jury were required to find it, or the jury's verdicts on the other counts on which the defendant was convicted compel the conclusion they necessarily found the element on which they were not instructed" (citation and quotation omitted). Mitchell, 95 Mass. App. Ct. at 412.

In the case before us, by contrast, the loaded firearm was found directly on the defendant's person. It was loaded and had a bullet in its chamber. Moreover, the jury heard evidence that shortly before the police discovered the gun on the defendant, the defendant had flashed it at a third party as part of a robbery.³ From such evidence, rational jurors could draw a reasonable inference that the defendant knew that the gun he had in his pocket was loaded. See Commonwealth v. Resende, 94 Mass. App. Ct. 194, 200-201 (2018) (jury could apply "commonsense inference" that "a person would check to see if the firearm was loaded before putting it in his waistband"; inference that defendant knew firearm was loaded strengthened by evidence that he had threatened someone and made reference to firearm shortly before police arrived). See generally Commonwealth v. Bennett,

³ The defendant highlights that the relevant eyewitness's testimony includes inconsistent statements regarding whether he had seen the defendant flash a gun at him and whether any such gun was black or silver. For example, at one point he stated that he had no current memory of having seen a weapon, but at other points testified that he saw the defendant briefly flash what he believed to be a gun. It is up to the jury to sift through conflicting evidence, and it is our role, in assessing the legal sufficiency of the Commonwealth's evidence, to view that evidence in the light most favorable to the Commonwealth, including drawing all reasonable inferences in the Commonwealth's favor. See Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979). The fact that the jury acquitted the defendant of armed robbery, and assault and battery does not change this. See Commonwealth v. Spinucci, 472 Mass. 872, 878 (2015) ("The jury, of course, [a]re free to believe or disbelieve, in whole or in part, the testimony of each witness").

424 Mass. 64, 68 (1997) (inferences drawn from circumstantial evidence need not be necessary, only "reasonable and possible"). Accordingly, the Commonwealth's evidence was sufficient to support a conviction of unlawful possession of a loaded firearm, and the defendant is not entitled to a judgment of acquittal.

On the indictment charging the defendant with unlawful possession of a firearm, subsequent offense, the judgment is affirmed. On the indictment charging the defendant with unlawful possession of a loaded firearm, the judgment is reversed and the verdict is set aside.

So ordered.

By the Court (Wolohojian,
Milkey & Hand, JJ.⁴),



Clerk

Entered: July 8, 2019.

⁴ The panelists are listed in order of seniority.